

Office of the State Appellate Defender

Illinois Criminal Law Digest

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APPEAL

§2-2(b)

People v. Allen, 2016 IL App (4th) 140137 (No. 4-14-0137, 5/3/16)

1. A timely notice of appeal is a jurisdictional requirement for a reviewing court to hear an appeal. Under Supreme Court Rule 606(b), the notice of appeal must be filed within 30 days after the entry of the final judgment or 30 days after an order disposing of a timely motion against the judgment. In a criminal case, the judgment is final when sentence is imposed. Thus, a motion challenging the judgment must generally be filed within 30 days after the sentence is entered.

Supreme Court Rule 606(b) provides that where a timely post-trial or post-sentencing motion directed against the judgment “has been filed by counsel or by defendant, if not represented by counsel,” any notice of appeal filed before entry of the order disposing of the post-judgment motion has no effect and is to be stricken by the trial court. This rule applies whether the post-judgment motion was filed before or after the notice of appeal.

2. On November 1 2013, defendant was sentenced for a drug conviction. Defendant was represented at sentencing by trial counsel, who indicated that defendant wished to appeal but had no assets. The trial court directed the circuit clerk to file a notice of appeal on defendant’s behalf and appointed the Office of the State Appellate Defender as appellate counsel.

On November 6, five days later, defendant filed a *pro se* motion to reconsider the sentence. Two days later, the trial court entered an order striking the notice of appeal, which had not yet been filed by the circuit clerk. The clerk’s office then filed a notice of appeal four days after the trial court entered the order striking the notice of appeal.

On February 3, 2014, the trial court conducted a hearing at which trial counsel appeared and declined to adopt defendant’s *pro se* motion. The trial court ordered the *pro se* motion stricken because defendant was represented by counsel. A docket entry stated that the notice of appeal was “reinstated,” and a second notice of appeal was filed February 20, 2014.

On appeal, the State argued that the court lacked jurisdiction to consider the appeal. The State argued that: (1) defendant’s *pro se* motion was a nullity because he was represented by counsel when the motion was filed, (2) the trial court erred by striking the original notice of appeal, and (3) the court lacked jurisdiction because a timely notice of appeal was not filed within 30 days of sentencing.

The court rejected the State’s argument, finding no evidence that defendant was represented by counsel when he filed the *pro se* motion. Trial counsel indicated that defendant wished to appeal, and the Office of the State Appellate Defender was appointed

for purposes of the appeal. Defendant's *pro se* motion noted service on the court and the State's Attorney's office, and was filed before the notice of appeal was filed by the clerk's office. The court concluded that because the *pro se* motion was filed while defendant was unrepresented, it tolled the time period for filing a notice of appeal. The notice of appeal filed February 20, 2014 was therefore timely and afforded jurisdiction for the Appellate Court to consider the appeal.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

ARMED VIOLENCE

§3-2

People v. Hernandez, 2016 IL 118672 (No. 118672, 5/19/16)

1. The proportionate penalties clause of the Illinois Constitution provides that all penalties shall be determined according to the seriousness of the offense. Ill. Const. 1970, art. I, §11. Under the "identical elements" test, a sentence will violate the clause if it is greater than the sentence for an offense with identical elements. If the legislature provides two different penalties for the exact same elements, then one of the penalties has not been set in accordance with the seriousness of the offense. Where identical offenses yield different penalties, the penalties are unconstitutionally disproportionate and the greater penalty cannot stand.

2. Defendant was convicted of armed robbery and sentenced to an extended Class X term of 40 years imprisonment. Defendant was armed with a heavy pair of tin snips and the State charged this as a "dangerous weapon, a bludgeon." Defendant eventually filed a post-conviction petition arguing that his sentence violated the proportionate penalties clause. The circuit court agreed and held that the armed robbery statute was facially unconstitutional because it carried a harsher penalty, a Class X sentence, than armed violence with a Category III weapon, which had the same elements but only carried a Class 2 sentence.

3. The Supreme Court reversed the circuit court, holding that armed robbery with a dangerous weapon did not have the same elements as armed violence with a category III weapon. A dangerous weapon for the purposes of armed robbery includes objects that may be used in a dangerous manner. By contrast, a category III weapon in the armed violence statute is specifically defined as a "a bludgeon, black-jack, slungshot, sand-bag, sand club, metal knuckles, billy, or other dangerous weapon of like character." 720 ILCS 5/33A-1, 33A-2.

The tin snips used here qualified as a dangerous weapon under the armed robbery statute since they were heavy and large enough that they may be used in a dangerous

manner. But while the tin snips might be capable of being used as a bludgeon, they are not typically identified as such and thus are not “of like character” to the bludgeon-type weapons included as category III weapons.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

BATTERY, ASSAULT, & STALKING OFFENSES

§7-1(a)(3)

People v. Gray, 2016 IL App (1st) 134012 (No. 1-13-4012, 5/18/16)

1. Defendant was convicted of aggravated domestic battery, which requires the State to prove among other things that the victim was “any family or household member.” 720 ILCS 5/12-3.3(a), (a-5). A family or household member includes “persons who have or have had a dating relationship.” 725 ILCS 5/112A-3(3). Here defendant and the victim had a dating relationship that had ended 15 years before the offense occurred. The court held that under these facts the aggravated domestic battery statute was unconstitutional as applied.

2. The court first held that it could address this issue even though it was being raised for the first time on appeal. In **Thompson**, 2015 IL 118151, the Illinois Supreme Court held that unlike a facial constitutional challenge to a statute, which may be raised at any time, the defendant could not raise an as-applied constitutional challenge to his sentence for the first time on appeal from the dismissal of his 2-1401 petition. While a facial challenge argues that the statute is unconstitutional under any set of facts, an as-applied challenge argues that the statute is unconstitutional only under the specific facts of the case. Because as-applied challenges are dependent on specific facts, the record must be sufficiently developed to allow appellate review.

Despite defendant’s failure to raise this issue below, the court held that the record here was sufficiently developed to review the claim. At trial, the parties thoroughly explored defendant’s relationship with the victim and it was clear that they had not dated for 15 years.

3. Due process prohibits the unreasonable or arbitrary use of police power. If, as in this case, no substantial rights are at issue, courts apply the rational basis test. Under this test, a law will be upheld so long as it bears a reasonable relationship to a public interest and the means adopted are a reasonable way of accomplishing the State’s objectives. The legislature’s judgment may be based on rational speculation rather than empirical data.

The court held that the State has an interest in preventing abuse between people who share an intimate relationship. And a couple's romantic intimacy may outlive the duration of the dating relationship. But here the record does not suggest that defendant and the victim was still under the effect of romantic intimacy from their relationship 15 years earlier. The State failed to identify any objective that would be furthered by treating the victim here as a family member. Accordingly, the statute was unconstitutional as applied to defendant. His conviction for aggravated domestic battery was reversed.

(Defendant was represented by Assistant Defender Chris Bendik, Chicago.)

COLLATERAL REMEDIES

§9-1(b)(1)

People v. Sandoval-Carrillo, 2016 IL App (2d) 140332 (No. 2-14-0332, 5/24/16)

Defendant appealed the dismissal of his post-conviction petition in which he argued among other things that his conviction was void because the trial court did not have jurisdiction over his case where the State never charged defendant by indictment or information.

The State argued that defendant, who was still on probation, no longer had standing to file a petition since he had been deported and thus his liberty was no longer curtailed. The court rejected this argument on two grounds.

First, even if defendant did not have standing, the court could still address his argument that his conviction was void. Lack of standing does not deprive a court of jurisdiction and a court may address any voidness argument that it properly before it.

Second, defendant still had standing because he had not already completed his sentence. It is only when a defendant has fully completed his sentence that he no longer has standing. The fact that defendant had been deported did not deprive him of standing under these circumstances.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

§§9-1(j)(1), 9-1(j)(2)

People v. Cotto, 2016 IL 119006 (No. 119006, 5/19/16)

1. There is no constitutional right to the assistance of counsel during post-conviction proceedings. Instead, the assistance of counsel in such proceedings is a matter of legislative grace. In enacting the Post-Conviction Hearing Act, the legislature provided that post-conviction petitioners are to receive reasonable assistance by counsel.

Resolving a conflict in Appellate Court precedent, the Supreme Court accepted the State's concession that the reasonable assistance standard applies whether counsel is appointed or retained. "Both retained and appointed counsel must provide reasonable assistance to their clients after a petition is advanced from first-stage proceedings."

2. Here, privately retained post-conviction counsel provided a reasonable level of assistance. Counsel drafted a petition with several claims alleging due process violations and ineffective assistance by trial counsel and appellate counsel. The petition contained several supporting attachments including affidavits and more than 100 pages of transcripts. The petition survived first-stage dismissal but was dismissed at second-stage proceedings.

The only error which defendant alleged on appeal was that retained post-conviction counsel failed to adequately show that the untimely filing of the petition was not due to defendant's culpable negligence. Defendant claimed that he was not responsible for the delay because appellate counsel failed to inform him that the Appellate Court had decided his appeal.

The Supreme Court noted that defendant failed to specify what information was available other than that which was introduced by the post-conviction attorney, and did not disclose when he retained post-conviction counsel. Most importantly, the petition was dismissed not because it was untimely, but on its merits. Under these circumstances, counsel's representation was reasonable.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

COUNSEL

§13-4(b)(2)

People v. Williams, 2016 IL App (4th) 140502 (No. 4-14-0502, 5/11/16)

Where a post-conviction petitioner claims that trial counsel was ineffective in guilty plea negotiations, the **Strickland** standard applies. Thus, the petitioner must show that counsel's performance was deficient and that prejudice resulted. In the context

of guilty plea negotiations, prejudice is shown where: (1) there is a reasonable probability that defendant would have accepted the plea offer absent counsel's deficient performance, and (2) the guilty plea offer would not have been withdrawn by the State or refused by the trial court.

Defendant's post-conviction petition alleged that he would have accepted the State's guilty-plea offer of an 18-year-sentence had defense counsel informed him that if he was convicted he could receive consecutive sentences and would be required to serve 85% of the sentence for first degree murder. The court concluded that the petition alleged a substantial constitutional violation and that the trial court therefore erred by entering a dismissal order at second-stage proceedings. The cause was remanded for third stage proceedings.

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

§13-4(b)(9)

People v. Billups, 2016 IL App (1st) 134006 (Nos. 1-13-4006 & 1-13-4007 cons., 5/24/16)

Defendant's pre-sentence investigation report listed numerous prior convictions, including three convictions for weapons offenses. Two of the weapons offenses were based on statutes that had been declared unconstitutional in **Aguilar**, 2013 IL 112116. The other weapons offense, unlawful possession by a felon, was not based on an unconstitutional statute, but the underlying felony may have been one of the improper gun offenses. Defense counsel did not object to the information in the PSI and the trial court stated in imposing sentence that defendant had been "in the penitentiary for narcotics and gun cases."

The Appellate Court held that counsel provided ineffective assistance by failing to object to the trial court's consideration of the two improper convictions. The Appellate Court noted that **Aguilar** had been decided before the sentencing hearing in this case, and found that competent counsel would have objected to the convictions. The failure to object could not have served any strategic purpose.

And because the trial court specifically relied on defendant's gun convictions in imposing sentence, there was a reasonable probability that the court would have imposed a lesser sentence if counsel had objected. Defendant was thus prejudiced by counsel's error.

The case was remanded for resentencing.

(Defendant was represented by Assistant Defender Josh Bernstein, Chicago.)

GUILTY PLEAS

§§24-1, 24-3

People v. Williams, 2016 IL App (4th) 140502 (No. 4-14-0502, 5/11/16)

1. The court recommended that in order to eliminate the likelihood of post-conviction proceedings raising issues that are outside the record, trial courts “should go through a ‘preflight checklist’” concerning the defendant’s decision to reject a plea offer and go to trial. As part of such a “checklist,” the court believed that the trial judge should:

a. Ensure that the prosecutor, defense attorney, and defendant all understand the applicable minimum and maximum sentences, including any sentencing enhancements, mandatory or discretionary consecutive sentencing options, and truth-in-sentencing considerations.

b. Inquire of the prosecution whether it entered negotiations with defense counsel, whether a guilty-plea offer was made, and the exact nature of the offer (including expiration dates, if any).

c. Confirm the plea offer with defense counsel and determine whether counsel conveyed that offer to the defendant.

d. Confirm personally with the defendant his understanding of the State's guilty-plea offer as conveyed by his counsel.

e. Ensure that the defendant understands that he or she has the right to decide whether to accept or reject the State's offer, after consultation with counsel.

f. Confirm the defendant's decision to reject the State's guilty plea offer.

g. Confirm that given his understanding of the minimum and maximum possible sentences, the defendant wishes to persist with his decision regarding the guilty-plea offer.

h. Admonish the defendant that although he or she should consider counsel's advice, it is up to the defendant whether to enter a guilty or not guilty plea and whether to have a jury or bench trial.

2. Where a post-conviction petitioner claims that trial counsel was ineffective in guilty plea negotiations, the **Strickland** standard applies. Thus, the petitioner must show that counsel’s performance was deficient and that prejudice resulted. In the context of guilty plea negotiations, prejudice is shown where: (1) there is a reasonable probability that defendant would have accepted the plea offer absent counsel’s deficient performance,

and (2) the guilty plea offer would not have been withdrawn by the State or refused by the trial court.

Defendant's post-conviction petition alleged that he would have accepted the State's guilty-plea offer of an 18-year-sentence had defense counsel informed him that if he was convicted he could receive consecutive sentences and would be required to serve 85% of the sentence for first degree murder. The court concluded that the petition alleged a substantial constitutional violation and that the trial court therefore erred by entering a dismissal order at second-stage proceedings. The cause was remanded for third stage proceedings.

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

JURY

§32-4(c)(3)

Foster v. Chatman, 578 U. S. ___, ___ S. Ct. ___, ___ L.E.2d ___ (No. 14-8349, 5/23/16)

The constitution forbids striking even one prospective juror for racially discriminatory purposes. **Batson**, 476 U.S. 79 (1986), provides a three-step process for determining when a peremptory strike has been used improperly. First, a defendant must make a *prima facie* case of discrimination. If that case has been made, the prosecution must offer a race-neutral basis for the strike. Finally, the court must determine whether the defendant has shown purposeful discrimination. Here, only the third step was at issue.

The court held that defendant established that the prosecution used two of its peremptory challenges in a racially discriminatory manner. Although the prosecution provided numerous facially race-neutral explanations for its two challenges, the record demonstrated that the explanations were false and pre-textual.

JUVENILE

§33-6(a)

In re A.C., 2016 IL App (1st) 153047 (No. 1-15-3047, 5/18/16)

The combination of the Sex Offender Registration Act (730 ILCS 150/1) and the Sex Offender Community Notification Law (730 ILCS 152/101) (SORA) as applied to juveniles does not violate due process or the eighth amendment/proportionate penalties

clauses of the federal and Illinois constitutions. SORA does not violate substantive due process since it does not affect fundamental rights and there is a rational relationship between SORA's restrictions and the State's legitimate interests. SORA does not violate procedural due process since SORA only applies after a criminal conviction and there is no need for further hearings. And SORA does not violate the eighth amendment/proportionate penalties clause since it does not involve punishment.

§33-6(b)

In re H.L., 2016 IL App (2d) 140486-B (No. 2-14-0486, 5/12/16)

1. The court noted that in 2012, 75 ILCS 45/5-750(1) was amended to require that before a delinquent minor can be sentenced to the Department of Corrections, the trial court must make an explicit finding that commitment to DOC is the least restrictive alternative. Where the trial court failed to make such an explicit finding, the cause must be remanded for compliance with the procedure required under the Juvenile Court Act.

2. The court rejected the State's argument that the required finding need not be explicit where the trial court mentioned alternative dispositions in announcing the disposition or where there was evidence that commitment to DOC was the least restrictive disposition. The statutory amendment adopted in 2012 clearly requires an explicit finding, and cannot be rewritten under the guise of interpretation.

The commitment order was reversed and the cause remanded for further proceedings.

(The minor was represented by Assistant Defender Sherry Silvern, Elgin.)

ROBBERY

§43-2

People v. Hernandez, 2016 IL 118672 (No. 118672, 5/19/16)

1. The proportionate penalties clause of the Illinois Constitution provides that all penalties shall be determined according to the seriousness of the offense. Ill. Const. 1970, art. I, §11. Under the "identical elements" test, a sentence will violate the clause if it is greater than the sentence for an offense with identical elements. If the legislature provides two different penalties for the exact same elements, then one of the penalties has not been set in accordance with the seriousness of the offense. Where identical

offenses yield different penalties, the penalties are unconstitutionally disproportionate and the greater penalty cannot stand.

2. Defendant was convicted of armed robbery and sentenced to an extended Class X term of 40 years imprisonment. Defendant was armed with a heavy pair of tin snips and the State charged this as a “dangerous weapon, a bludgeon.” Defendant eventually filed a post-conviction petition arguing that his sentence violated the proportionate penalties clause. The circuit court agreed and held that the armed robbery statute was facially unconstitutional because it carried a harsher penalty, a Class X sentence, than armed violence with a Category III weapon, which had the same elements but only carried a Class 2 sentence.

3. The Supreme Court reversed the circuit court, holding that armed robbery with a dangerous weapon did not have the same elements as armed violence with a category III weapon. A dangerous weapon for the purposes of armed robbery includes objects that may be used in a dangerous manner. By contrast, a category III weapon in the armed violence statute is specifically defined as a “a bludgeon, black-jack, slungshot, sand-bag, sand club, metal knuckles, billy, or other dangerous weapon of like character.” 720 ILCS 5/33A-1, 33A-2.

The tin snips used here qualified as a dangerous weapon under the armed robbery statute since they were heavy and large enough that they may be used in a dangerous manner. But while the tin snips might be capable of being used as a bludgeon, they are not typically identified as such and thus are not “of like character” to the bludgeon-type weapons included as category III weapons.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

SEARCH & SEIZURE

§44-5(c)(3)

People v. Swanson, 2016 IL App (2d) 150340 (No. 2-15-0304, 5/9/16)

1. A warrantless entry into a home is presumed unreasonable. But a warrant is not needed when the owner consents to the entry or when the police enter for the purposes of providing emergency aid. The court held that neither exception applied in this case.

2. On a bitterly cold January evening, defendant was driving home from a tavern when he lost control of his car, slid into a snowy ditch, and struck a sign with enough impact to deploy the airbags. Defendant could not start his car so he started to walk home. About a mile down the road, defendant went to the door of a house, but the

occupants would not let him in and instead called 911. Defendant then walked the remaining mile to his house.

Meanwhile police officers responded to the 911 call of a suspicious and disoriented person. On the way, they discovered the wrecked vehicle, learned that it belonged to defendant and sent an officer to his house. The officer arrived before defendant, spoke to defendant's wife, explained that defendant had been in an accident, left his business card for her, and told her to call when defendant arrived home.

A short while later, defendant arrived home freezing cold and covered in snow. Defendant's wife tended to him and then called the police. She told them that defendant had arrived home safely and did not need any medical attention. An officer told her that they needed to see defendant to verify that he was home, so they were coming to the house and she would have to let them in.

A few minutes later, the officers came to defendant's house. The wife opened the interior door, spoke to the officers through the closed storm door, and told them that defendant was fine. At one point, she opened the storm door slightly to hear what they were saying. When she did so, the officers opened the door further and walked in. They asked where defendant was. She said defendant was upstairs and he was fine. Defendant came to the top of the stairs and he too told the officers he was fine. The officers told defendant that if he did not come downstairs they would go up and get him.

Defendant came downstairs and the officers noted that he appeared drunk. The officers arrested defendant for leaving the scene of an accident, removed him from the house, and later charged him with driving under the influence.

3. The court first held that defendant's wife did not consent to the officers' entry into the house. She clearly told the officers that she and defendant did not need help and that they could leave. She spoke to them through a closed storm door, which she only opened slightly to facilitate conversation, not as a gesture to come inside. Nothing in her actions, either directly or indirectly, could be viewed as consent.

4. The court also found that the police did not enter the house for the purpose of providing emergency aid. The emergency-aid doctrine applies when (1) there is an emergency at hand and (2) the emergency is connected to the area entered or searched.

Although defendant had been involved in an accident which caused serious damage to his car, by the time the officers arrived defendant was safely home and under his wife's care. There was no reasonable basis to conclude that defendant needed aid, especially since his wife repeatedly told the officers that he did not need help.

Because the officers had no warrant to enter defendant's home, and because there was neither consent nor a need for emergency aid, the Appellate Court affirmed the trial court's order granting defendant's motion to suppress.

SENTENCING

§§45-1(b)(1), 45-1(b)(3)

In re A.C., 2016 IL App (1st) 153047 (No. 1-15-3047, 5/18/16)

The combination of the Sex Offender Registration Act (730 ILCS 150/1) and the Sex Offender Community Notification Law (730 ILCS 152/101) (SORA) as applied to juveniles does not violate due process or the eighth amendment/proportionate penalties clauses of the federal and Illinois constitutions. SORA does not violate substantive due process since it does not affect fundamental rights and there is a rational relationship between SORA's restrictions and the State's legitimate interests. SORA does not violate procedural due process since SORA only applies after a criminal conviction and there is no need for further hearings. And SORA does not violate the eighth amendment/proportionate penalties clause since it does not involve punishment.

§§45-1(b)(1), 45-1(b)(3)

People v. Pollard, 2016 IL App (5th) 130514 (No. 5-13-0514, 5/10/16)

The Sex Offender Registration Act (730 ILCS 150/1) and its attendant statutory restrictions (SORA) do not violate due process or the Eighth Amendment/proportionate penalties clauses of the federal and Illinois constitutions. SORA does not violate substantive due process since it does not affect fundamental rights and there is a rational relationship between the SORA restrictions and the State's legitimate interests. SORA does not violate procedural due process since SORA only applies after a criminal conviction which provides all the procedural protections required by due process. And SORA does not violate the Eighth Amendment/Proportionate Penalties Clause since it does not involve punishment.

(Defendant was represented by Assistant Defender Joshua Bernstein, Chicago.)

§45-4(b)

People v. Billups, 2016 IL App (1st) 134006 (Nos. 1-13-4006 & 1-13-4007 cons., 5/24/16)

Defendant's pre-sentence investigation report listed numerous prior convictions, including three convictions for weapons offenses. Two of the weapons offenses were based on statutes that had been declared unconstitutional in **Aguilar**, 2013 IL 112116. The other weapons offense, unlawful possession by a felon, was not based on an unconstitutional statute, but the underlying felony may have been one of the improper gun offenses. Defense counsel did not object to the information in the PSI and the trial court stated

in imposing sentence that defendant had been “in the penitentiary for narcotics and gun cases.”

The Appellate Court held that counsel provided ineffective assistance by failing to object to the trial court’s consideration of the two improper convictions. The Appellate Court noted that **Aguilar** had been decided before the sentencing hearing in this case, and found that competent counsel would have objected to the convictions. The failure to object could not have served any strategic purpose.

And because the trial court specifically relied on defendant’s gun convictions in imposing sentence, there was a reasonable probability that the court would have imposed a lesser sentence if counsel had objected. Defendant was thus prejudiced by counsel’s error.

The case was remanded for resentencing.

(Defendant was represented by Assistant Defender Josh Bernstein, Chicago.)

§§45-7(b), 45-13

People v. Breeden, 2016 IL App (4th) 121049-B (No. 4-12-1049, 5/9/16)

The trial court imposed a fine of \$255 for Sexual Offender Registration, less than the minimum fine of \$500 required by the statute. 730 ILCS 150/10(a). The Appellate Court held that following the decision in **Castleberry**, 2015 IL 116916, the challenged fine was voidable rather than void and the State lacked the authority to request on appeal an increase in the amount of the fine imposed. The Appellate Court thus left the \$255 fine in place.

(Defendant was represented by Assistant Defender Daaron Kimmel, Springfield.)

§§45-7(b), 45-7(c), 45-13

People v. Buffkin, 2016 IL App (2d) 140792 (No. 2-14-0792, 5/16/16)

Defendant argued for the first time on appeal from the dismissal of his post-conviction petition that he was entitled to pre-sentence credit against his fines and that he was improperly assessed a DNA fee. The State confessed error on both claims.

The court first held that even though the issue was forfeited and the error was no longer considered void after **Castleberry**, it could award defendant credit against

his fines. In **Caballero**, 228 Ill. 2d 79 (2008), the Supreme Court held that under 725 ILCS 5/110-14, a defendant could apply for pre-sentence credit “at any time and at any stage of the court proceedings, even on appeal in a post-conviction proceeding.”

Caballero, however, did not apply to the DNA fee. And since the fee was no longer void after **Castleberry**, defendant could not collaterally attack the fee. Additionally, Supreme Court Rule 615(b)(1)&(4), which permits a court to modify the judgment order and reduce a defendant’s sentence did not apply because the judgment appealed here was the dismissal of defendant’s post-conviction petition, not his sentence. Because the time to directly attack his sentence was long past, the court held that it would normally lack jurisdiction to modify the sentence.

But since the State confessed error, the State revested the court with jurisdiction. The revestment doctrine provides that the parties may restore the court’s jurisdiction if both parties: (1) actively participate in the proceedings; (2) fail to object to the timeliness of a late filing; and (3) assert positions that are inconsistent with the merits of the prior judgment and support setting it aside. Although the revestment doctrine typically is applied in trial court, the court saw no basis for not applying it on appeal.

Here, both parties participated in the appeal, the State failed to object to the timeliness of defendant’s attack on his sentence, and both parties agreed to set the prior judgment aside. The court thus remanded the cause to the trial court to apply sentencing credit against defendant’s fine and vacate the DNA fee.

(Defendant was represented by Assistant Defender Erin Johnson, Elgin.)

§§45-7(b), 45-7(c)

People v. Warren, 2014 IL App (4th) 120721-B (No. 4-12-0721, mod. op. 5/26/16)

1. Rejecting its own opinion in **People v. Alghadi**, 2011 IL App (4th) 100012, the court found that the legislature may intend to authorize the imposition of certain fees and fines on each judgment or order of supervision, and not to limit the trial judge to imposing one charge for each case. The court concluded that the following fees and fines could be imposed on each count on which a conviction is entered: (1) the \$50 court finance fee (55 ILCS 5/5-1101(c), (g)), the \$40 State’s Attorney’s fee (55 ILCS 5/4-2002), the \$2 State’s Attorney’s automation fee (55 ILCS 5/4-2002(a)), the \$10 arrestee’s medical fine (730 ILCS 125/17), the \$30 juvenile expungement fund fine (730 ILCS 5/5-9-1.17), the \$5 drug-court fine (55 ILCS 5/5-1101(f)), the \$25 court-finance fee (55 ILCS 5/5-1101(c), (g)), and the Violent Crimes Victims Assistance Act fine (725 ILCS 240/10(b)).

The court noted, however, that several other fines and fees could be imposed only once in each case, including the \$5 document storage fee (705 ILCS 105/27.3c(a)), the

\$10 circuit clerk automation fee (705 ILCS 105/27.3a), the \$100 circuit clerk fee (705 ILCS 105/27.1a(w)), the \$25 court security fee (55 ILCS 5/5-1103), and the \$10 State Police Operations fine (705 ILCS 105/27.3a(1.5)).

2. A “fee” is a charge which seeks to recoup expenses incurred by the State or to compensate the State for some expenditure incurred in prosecuting the defendant. A “fine” is punitive in nature and is imposed as part of the sentence for a criminal offense. Furthermore, a charge that is labeled by the legislature as a “fee” is a “fine” if it is pecuniary in nature.

“Fines” may be imposed only by the trial court, while “fees” may be imposed by the circuit clerk. Any “fine” that is imposed by the clerk must be vacated and the cause remanded for imposition of the fine by the trial court.

The court vacated several “fines” which had been imposed by the circuit clerk and remanded the cause with instructions that such fines must be imposed by the trial court. The court held that **People v. Castleberry**, 2015 IL 116916 (2015), which abolished the void sentence rule, has no effect on the rule that fines may not be imposed by the clerk. However, the court concluded that **Castleberry** does preclude the State from seeking to increase a fine which was imposed by the trial court in an amount that was less than required by statute.

3. While noting that **Castleberry** may help to lessen the courts’ burden concerning mandatory fines and fees, the court reiterated its call for “comprehensive legislative revision” of mandatory fines and fees. The court stated, “The legislature continues to enact new fines, fees, and costs - in this case, leading to the imposition of 33 separate assessments. . . . This adds more complexity to many cases where the monetary assessments may not even be collected.”

The cause was remanded with instructions to the trial court to impose applicable fines.

(Defendant was represented by Supervisor Marty Ryan, Springfield.)

SEX OFFENSES

§46-5

People v. Grant, 2016 IL 119162 (No. 119162, 5/19/16)

The Supreme Court held that where a person committed to DOC as a sexually dangerous person files a recovery petition, the State does not have the right to hire an independent expert. Noting that the Sexually Dangerous Persons Act requires that DOC

employees prepare a report to be submitted to the trial court, the court concluded that the legislature did not contemplate that the State would hire an additional expert.

The court found that it need not decide whether there could be circumstances under which the State could show sufficient bias on the part of a DOC evaluator to justify allowing it to hire an independent expert, but noted that even if such circumstances arose the trial court would appoint an independent expert rather than allow the State to handpick the expert it wanted.

§46-7

In re A.C., 2016 IL App (1st) 153047 (No. 1-15-3047, 5/18/16)

The combination of the Sex Offender Registration Act (730 ILCS 150/1) and the Sex Offender Community Notification Law (730 ILCS 152/101) (SORA) as applied to juveniles does not violate due process or the eighth amendment/proportionate penalties clauses of the federal and Illinois constitutions. SORA does not violate substantive due process since it does not affect fundamental rights and there is a rational relationship between SORA's restrictions and the State's legitimate interests. SORA does not violate procedural due process since SORA only applies after a criminal conviction and there is no need for further hearings. And SORA does not violate the eighth amendment/proportionate penalties clause since it does not involve punishment.

§46-7

People v. Pollard, 2016 IL App (5th) 130514 (No. 5-13-0514, 5/10/16)

The Sex Offender Registration Act (730 ILCS 150/1) and its attendant statutory restrictions (SORA) do not violate due process or the Eighth Amendment/proportionate penalties clauses of the federal and Illinois constitutions. SORA does not violate substantive due process since it does not affect fundamental rights and there is a rational relationship between the SORA restrictions and the State's legitimate interests. SORA does not violate procedural due process since SORA only applies after a criminal conviction which provides all the procedural protections required by due process. And SORA does not violate the Eighth Amendment/Proportionate Penalties Clause since it does not involve punishment.

(Defendant was represented by Assistant Defender Joshua Bernstein, Chicago.)

SPEEDY TRIAL

§47-1(a)

Betterman v. Montana, ___ U. S. ___, ___ S. Ct. ___, ___ L.E.2d ___ (No. 14-1457, 5/19/16)

The Sixth Amendment provides that in criminal prosecutions, the accused has the right to a speedy and public trial. The court concluded that the Sixth Amendment right to a speedy trial applies only after the defendant has been charged and before a conviction is entered. When the State is investigating to determine whether to file a criminal charge, the primary protection against delay is the statute of limitations. After conviction and before sentencing, the due process clause protects against undue delay.

In the course of its opinion, the court noted that the presumption of innocence no longer applies once a person has been convicted. In addition, the sole remedy for a speedy trial violation is dismissal of the charges, a sanction which makes no sense in the context of a defendant who has been convicted but not yet sentenced.

The court also noted that some pre-sentencing delay is necessary for preparation of the pre-sentence report, and that unreasonable delay between conviction and sentencing is prohibited by the rules of various jurisdictions as well as by the due process clause.

§§47-1(b), 47-7

People v. McGee, 2015 IL App (1st) 130071 (Nos. 1-13-0071 & 1-13-0715 cons., modified upon allowance of rehearing 5/5/16)

1. Under the speedy-trial statute, every defendant must be tried within either 120 or 160 days, depending on his custodial status, unless delay is caused by the defendant. 725 ILCS 5/103-5. When a defendant is charged at different times with multiple offenses, the speedy-trial guarantee is “tempered by compulsory joinder principles.”

Under the compulsory joinder statute, multiple charges must be joined in a single prosecution where: (1) the charges are based on the same act, (2) the multiple charges are known to the prosecutor when the prosecution begins, and (3) the charges are within the jurisdiction of a single court. 720 ILCS 5/3-3.

2. The evidence showed that defendant and co-defendant severely beat the victim with a board in Illinois and that the victim’s burned body was found a few hours later in a burning building in Indiana. The medical examiner determined that the victim died from extensive blunt-force trauma and extensive burns. The medical examiner was not

certain whether the victim was dead or alive when the fire in the building started, but he did testify on cross-examination that he had told a colleague that the victim was dead when the fire started.

The State initially charged defendant with several offenses but not first-degree murder. Approximately 18 months later, the State filed a new indictment charging defendant with first-degree murder and nol-prossed the original charges. Defendant filed a motion to dismiss the new charges on speedy trial grounds. The trial court denied the motion.

3. The Appellate Court held that the State violated the speedy-trial statute by bringing new charges 18 months after the initial indictment. The court rejected the State's arguments that it was not required to join the murder charges when the original indictment was filed because: (1) the prosecution was not aware that the acts which caused defendant's death occurred in Illinois; and (2) the murder fell within the jurisdiction of more than one court.

First, the State argued that it only learned that the acts causing death occurred in Illinois, and thus only charged defendant with murder, when the medical examiner testified during cross-examination that he had once opined that the victim was already dead when the fire started. The court rejected this argument since the medical examiner's trial testimony could not possibly have prompted the State's pretrial decision to charge defendant with murder. Additionally, the court found that the State had ample knowledge, apart from the medical examiner's opinion, to charge defendant with murder.

Illinois has jurisdiction over a crime that occurs wholly or partly within the State. 720 ILCS 5/1-5(a)(1). An offense is committed partly in Illinois if the conduct that constitutes an element of the offense occurs in Illinois. 720 ILCS 5/1-5(b). The evidence here showed that the victim was severely beaten in Illinois just a few hours before his body was found in Indiana. Coupled with the medical examiner's opinion that the victim died from extensive blunt-force trauma, this evidence gave the State ample information to charge defendant with murder at the time it issued the original charges.

Second, the State argued that compulsory joinder does not apply to offenses where, as here, more than one State has jurisdiction over the case. The court rejected the State's argument, holding that the phrase "jurisdiction of a single court" does not preclude the State from bringing charges simply because another court also had jurisdiction. The compulsory joinder statute requires the State to bring all charges under its jurisdiction even when another State also has jurisdiction.

4. Since the murder charges were subject to compulsory joinder, the same speedy-trial time period applied to both the original and new charges. Further, although delay caused by the defendant tolls the speedy trial clock, continuances obtained in connection with the original charges cannot be attributed to defendant with regard to the new charges since the new charges were not before the court when defendant requested

continuances. Therefore none of the continuances defendant obtained here prior to the new charges could be attributed to him.

The court reversed defendant's conviction for first-degree murder, entered conviction on the lesser-included offense of aggravated battery, and remanded for resentencing.

(Defendant was represented by Assistant Defender Kadi Weck, Chicago.)

§§47-1(b), 47-7

People v. Moody, 2015 IL App (1st) 130071 (Nos. 1-13-0071 & 1-13-0715 cons., modified upon allowance of rehearing 5/5/16)

1. Under the speedy-trial statute, every defendant must be tried within either 120 or 160 days, depending on his custodial status, unless delay is caused by the defendant. 725 ILCS 5/103-5. When a defendant is charged at different times with multiple offenses, the speedy-trial guarantee is “tempered by compulsory joinder principles.”

Under the compulsory joinder statute, multiple charges must be joined in a single prosecution where: (1) the charges are based on the same act, (2) the multiple charges are known to the prosecutor when the prosecution begins, and (3) the charges are within the jurisdiction of a single court. 720 ILCS 5/3-3.

2. The evidence showed that defendant and co-defendant severely beat the victim with a board in Illinois and that the victim's burned body was found a few hours later in a burning building in Indiana. The medical examiner determined that the victim died from extensive blunt-force trauma and extensive burns. The medical examiner was not certain whether the victim was dead or alive when the fire in the building started, but he did testify on cross-examination that he had told a colleague that the victim was dead when the fire started.

The State initially charged defendant with several offenses but not first-degree murder. Approximately 18 months later, the State filed a new indictment charging defendant with first-degree murder and nol-prossed the original charges. Defendant filed a motion to dismiss the new charges on speedy trial grounds. The trial court denied the motion.

3. The Appellate Court held that the State violated the speedy-trial statute by bringing new charges 18 months after the initial indictment. The court rejected the State's arguments that it was not required to join the murder charges when the original indictment was filed because: (1) the prosecution was not aware that the acts which

caused defendant's death occurred in Illinois; and (2) the murder fell within the jurisdiction of more than one court.

First, the State argued that it only learned that the acts causing death occurred in Illinois, and thus only charged defendant with murder, when the medical examiner testified during cross-examination that he had once opined that the victim was already dead when the fire started. The court rejected this argument since the medical examiner's trial testimony could not possibly have prompted the State's pretrial decision to charge defendant with murder. Additionally, the court found that the State had ample knowledge, apart from the medical examiner's opinion, to charge defendant with murder.

Illinois has jurisdiction over a crime that occurs wholly or partly within the State. 720 ILCS 5/1-5(a)(1). An offense is committed partly in Illinois if the conduct that constitutes an element of the offense occurs in Illinois. 720 ILCS 5/1-5(b). The evidence here showed that the victim was severely beaten in Illinois just a few hours before his body was found in Indiana. Coupled with the medical examiner's opinion that the victim died from extensive blunt-force trauma, this evidence gave the State ample information to charge defendant with murder at the time it issued the original charges.

Second, the State argued that compulsory joinder does not apply to offenses where, as here, more than one State has jurisdiction over the case. The court rejected the State's argument, holding that the phrase "jurisdiction of a single court" does not preclude the State from bringing charges simply because another court also had jurisdiction. The compulsory joinder statute requires the State to bring all charges under its jurisdiction even when another State also has jurisdiction.

4. Since the murder charges were subject to compulsory joinder, the same speedy-trial time period applied to both the original and new charges. Further, although delay caused by the defendant tolls the speedy trial clock, continuances obtained in connection with the original charges cannot be attributed to defendant with regard to the new charges since the new charges were not before the court when defendant requested continuances. Therefore none of the continuances defendant obtained here prior to the new charges could be attributed to him.

The court reversed defendant's conviction for first-degree murder.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

STATUTES

§48-3(a)

People v. Gray, 2016 IL App (1st) 134012 (No. 1-13-4012, 5/18/16)

1. Defendant was convicted of aggravated domestic battery, which requires the State to prove among other things that the victim was “any family or household member.” 720 ILCS 5/12-3.3(a), (a-5). A family or household member includes “persons who have or have had a dating relationship.” 725 ILCS 5/112A-3(3). Here defendant and the victim had a dating relationship that had ended 15 years before the offense occurred. The court held that under these facts the aggravated domestic battery statute was unconstitutional as applied.

2. The court first held that it could address this issue even though it was being raised for the first time on appeal. In **Thompson**, 2015 IL 118151, the Illinois Supreme Court held that unlike a facial constitutional challenge to a statute, which may be raised at any time, the defendant could not raise an as-applied constitutional challenge to his sentence for the first time on appeal from the dismissal of his 2-1401 petition. While a facial challenge argues that the statute is unconstitutional under any set of facts, an as-applied challenge argues that the statute is unconstitutional only under the specific facts of the case. Because as-applied challenges are dependent on specific facts, the record must be sufficiently developed to allow appellate review.

Despite defendant’s failure to raise this issue below, the court held that the record here was sufficiently developed to review the claim. At trial, the parties thoroughly explored defendant’s relationship with the victim and it was clear that they had not dated for 15 years.

3. Due process prohibits the unreasonable or arbitrary use of police power. If, as in this case, no substantial rights are at issue, courts apply the rational basis test. Under this test, a law will be upheld so long as it bears a reasonable relationship to a public interest and the means adopted are a reasonable way of accomplishing the State’s objectives. The legislature’s judgment may be based on rational speculation rather than empirical data.

The court held that the State has an interest in preventing abuse between people who share an intimate relationship. And a couple’s romantic intimacy may outlive the duration of the dating relationship. But here the record does not suggest that defendant and the victim was still under the effect of romantic intimacy from their relationship 15 years earlier. The State failed to identify any objective that would be furthered by treating the victim here as a family member. Accordingly, the statute was unconstitutional as applied to defendant. His conviction for aggravated domestic battery was reversed.

(Defendant was represented by Assistant Defender Chris Bendik, Chicago.)

TRIAL JOINDER AND SEVERANCE

§51-2

People v. McGee, 2015 IL App (1st) 130071 (Nos. 1-13-0071 & 1-13-0715 cons., modified upon allowance of rehearing 5/5/16)

1. Under the speedy-trial statute, every defendant must be tried within either 120 or 160 days, depending on his custodial status, unless delay is caused by the defendant. 725 ILCS 5/103-5. When a defendant is charged at different times with multiple offenses, the speedy-trial guarantee is “tempered by compulsory joinder principles.”

Under the compulsory joinder statute, multiple charges must be joined in a single prosecution where: (1) the charges are based on the same act, (2) the multiple charges are known to the prosecutor when the prosecution begins, and (3) the charges are within the jurisdiction of a single court. 720 ILCS 5/3-3.

2. The evidence showed that defendant and co-defendant severely beat the victim with a board in Illinois and that the victim’s burned body was found a few hours later in a burning building in Indiana. The medical examiner determined that the victim died from extensive blunt-force trauma and extensive burns. The medical examiner was not certain whether the victim was dead or alive when the fire in the building started, but he did testify on cross-examination that he had told a colleague that the victim was dead when the fire started.

The State initially charged defendant with several offenses but not first-degree murder. Approximately 18 months later, the State filed a new indictment charging defendant with first-degree murder and nol-prossed the original charges. Defendant filed a motion to dismiss the new charges on speedy trial grounds. The trial court denied the motion.

3. The Appellate Court held that the State violated the speedy-trial statute by bringing new charges 18 months after the initial indictment. The court rejected the State’s arguments that it was not required to join the murder charges when the original indictment was filed because: (1) the prosecution was not aware that the acts which caused defendant’s death occurred in Illinois; and (2) the murder fell within the jurisdiction of more than one court.

First, the State argued that it only learned that the acts causing death occurred in Illinois, and thus only charged defendant with murder, when the medical examiner testified during cross-examination that he had once opined that the victim was already dead when the fire started. The court rejected this argument since the medical examiner’s trial testimony could not possibly have prompted the State’s pretrial decision to charge defendant with murder. Additionally, the court found that the State had ample knowledge, apart from the medical examiner’s opinion, to charge defendant with murder.

Illinois has jurisdiction over a crime that occurs wholly or partly within the State. 720 ILCS 5/1-5(a)(1). An offense is committed partly in Illinois if the conduct that constitutes an element of the offense occurs in Illinois. 720 ILCS 5/1-5(b). The evidence here showed that the victim was severely beaten in Illinois just a few hours before his body was found in Indiana. Coupled with the medical examiner's opinion that the victim died from extensive blunt-force trauma, this evidence gave the State ample information to charge defendant with murder at the time it issued the original charges.

Second, the State argued that compulsory joinder does not apply to offenses where, as here, more than one State has jurisdiction over the case. The court rejected the State's argument, holding that the phrase "jurisdiction of a single court" does not preclude the State from bringing charges simply because another court also had jurisdiction. The compulsory joinder statute requires the State to bring all charges under its jurisdiction even when another State also has jurisdiction.

4. Since the murder charges were subject to compulsory joinder, the same speedy-trial time period applied to both the original and new charges. Further, although delay caused by the defendant tolls the speedy trial clock, continuances obtained in connection with the original charges cannot be attributed to defendant with regard to the new charges since the new charges were not before the court when defendant requested continuances. Therefore none of the continuances defendant obtained here prior to the new charges could be attributed to him.

The court reversed defendant's conviction for first-degree murder, entered conviction on the lesser-included offense of aggravated battery, and remanded for re-sentencing.

(Defendant was represented by Assistant Defender Kadi Weck, Chicago.)

§51-2

People v. Moody, 2015 ILApp (1st) 130071 (Nos. 1-13-0071 & 1-13-0715 cons., modified upon allowance of rehearing 5/5/16)

1. Under the speedy-trial statute, every defendant must be tried within either 120 or 160 days, depending on his custodial status, unless delay is caused by the defendant. 725 ILCS 5/103-5. When a defendant is charged at different times with multiple offenses, the speedy-trial guarantee is "tempered by compulsory joinder principles."

Under the compulsory joinder statute, multiple charges must be joined in a single prosecution where: (1) the charges are based on the same act, (2) the multiple charges

are known to the prosecutor when the prosecution begins, and (3) the charges are within the jurisdiction of a single court. 720 ILCS 5/3-3.

2. The evidence showed that defendant and co-defendant severely beat the victim with a board in Illinois and that the victim's burned body was found a few hours later in a burning building in Indiana. The medical examiner determined that the victim died from extensive blunt-force trauma and extensive burns. The medical examiner was not certain whether the victim was dead or alive when the fire in the building started, but he did testify on cross-examination that he had told a colleague that the victim was dead when the fire started.

The State initially charged defendant with several offenses but not first-degree murder. Approximately 18 months later, the State filed a new indictment charging defendant with first-degree murder and nol-prossed the original charges. Defendant filed a motion to dismiss the new charges on speedy trial grounds. The trial court denied the motion.

3. The Appellate Court held that the State violated the speedy-trial statute by bringing new charges 18 months after the initial indictment. The court rejected the State's arguments that it was not required to join the murder charges when the original indictment was filed because: (1) the prosecution was not aware that the acts which caused defendant's death occurred in Illinois; and (2) the murder fell within the jurisdiction of more than one court.

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Illinois has jurisdiction over a crime that occurs wholly or partly within the State. 720 ILCS 5/1-5(a)(1). An offense is committed partly in Illinois if the conduct that constitutes an element of the offense occurs in Illinois. 720 ILCS 5/1-5(b). The evidence here showed that the victim was severely beaten in Illinois just a few hours before his body was found in Indiana. Coupled with the medical examiner's opinion that the victim died from extensive blunt-force trauma, this evidence gave the State ample information to charge defendant with murder at the time it issued the original charges.

Second, the State argued that compulsory joinder does not apply to offenses where, as here, more than one State has jurisdiction over the case. The court rejected the State's argument, holding that the phrase "jurisdiction of a single court" does not preclude the State from bringing charges simply because another court also had jurisdiction. The

compulsory joinder statute requires the State to bring all charges under its jurisdiction even when another State also has jurisdiction.

4. Since the murder charges were subject to compulsory joinder, the same speedy-trial time period applied to both the original and new charges. Further, although delay caused by the defendant tolls the speedy trial clock, continuances obtained in connection with the original charges cannot be attributed to defendant with regard to the new charges since the new charges were not before the court when defendant requested continuances. Therefore none of the continuances defendant obtained here prior to the new charges could be attributed to him.

The court reversed defendant's conviction for first-degree murder.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

VENUE & JURISDICTION

Ch. 54

People v. Sandoval-Carrillo, 2016 IL App (2d) 140332 (No. 2-14-0332, 5/24/16)

The State's failure to charge defendant with a felony by an indictment or information did not deprive the trial court of subject matter or personal jurisdiction. Here the prosecution was commenced when a police officer filed a complaint for preliminary hearing without any input from the prosecutor. Although Illinois law requires all felony prosecutions to be initiated by an information or indictment, the failure to do so did not affect the trial court's jurisdiction.

Subject matter jurisdiction is created by the Illinois Constitution which gives trial courts subject-matter jurisdiction over all justiciable matters. (Ill. Const., 1970, art. VI, §9.) The complaint for preliminary hearing stated an actual offense and thus presented the trial court with a justiciable matter, which gave it subject matter jurisdiction.

The court also had personal jurisdiction. Although personal jurisdiction does not attach where the prosecutor neither initiated nor acquiesced in the prosecution by the time a final judgment has been entered, here the prosecutor, while not initiating the prosecution, had clearly acquiesced in it by amending the complaint and participating in the proceedings that resulted in defendant's guilty plea.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

WAIVER - PLAIN ERROR - HARMLESS ERROR

§56-1(a)

People v. Hernandez, 2016 IL 118672 (No. 118672, 5/19/16)

Judicial estoppel is an equitable doctrine used by the court at its discretion to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. Judicial estoppel applies when litigants take a factual position, benefit from that position, then take a contrary factual position in a later proceeding. The core concern in judicial estoppel is that a party takes factually inconsistent positions.

Defendant argued that the State was judicially estopped from arguing on appeal that armed robbery with a dangerous weapon did not have the identical elements as armed violence with a category III weapon, which includes bludgeons, since it charged defendant at trial with committing armed robbery with a bludgeon.

The Supreme Court held that judicial estoppel did not apply because while the State took a factual position at trial by arguing that the weapon was a bludgeon, it took a legal position on appeal when it argued that the two statutes did not have identical elements. The State did not take factually inconsistent positions at trial and on appeal and hence was not estopped.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

§56-1(b)(4)(b)

People v. Gray, 2016 IL App (1st) 134012 (No. 1-13-4012, 5/18/16)

Defendant argued for the first time on appeal that the aggravated domestic battery statute (720 ILCS 5/12-3.3(a), (a-5)) was unconstitutional as applied to him. The court held that it could address this issue even though it was being raised for the first time on appeal.

In **Thompson**, 2015 IL 118151, the Illinois Supreme Court held that unlike a facial constitutional challenge to a statute, which may be raised at any time, the defendant could not raise an as-applied constitutional challenge to his sentence for the first time on appeal from the dismissal of his 2-1401 petition. While a facial challenge argues that the statute is unconstitutional under any set of facts, an as-applied challenge argues that the statute is unconstitutional only under the specific facts of the case. Because as-applied challenges are dependent on specific facts, the record must be sufficiently developed to allow appellate review.

Despite defendant's failure to raise this issue below, the court held that the record here was sufficiently developed to review the claim. At trial, the parties thoroughly explored defendant's relationship with the victim and provided a complete basis to analyze the as-applied constitutional attack.

(Defendant was represented by Assistant Defender Chris Bendik, Chicago.)

§56-3(a)

People v. Diggins, 2016 IL App (1st) 142088 (No. 1-14-2088, 5/31/16)

Defendant was convicted of aggravated unlawful use of a weapon based on his failure to have a firearm owner's identification (FOID) card. To prove the lack of a FOID card, the State introduced a certified letter from the Illinois State Police stating that defendant's application for a FOID card had been denied. The document was signed and notarized.

The court held that the admission of the certified letter violated defendant's right of confrontation. Although defendant testified at trial that he did not have a FOID card, the court held that the error was not harmless. If the affidavit had been properly excluded, the State would not have been able to prove an essential element of the offense and defendant may have decided not to testify. The court reversed the conviction and remanded the case for a new trial.

(Defendant was represented by Assistant Defender Chris Bendik, Chicago.)

WITNESSES

§57-6(b)(1)

People v. Diggins, 2016 IL App (1st) 142088 (No. 1-14-2088, 5/31/16)

Under the confrontation clauses (U.S. Const. amend VI, Ill. Const., art I, §8), testimonial statements made out of court can be admitted only where the declarant is unavailable and where defendant has had a prior opportunity to cross-examine. Testimonial statements include affidavits.

Defendant was convicted of aggravated unlawful use of a weapon based on his failure to have a firearm owner's identification (FOID) card. To prove the lack of a FOID card, the State introduced a certified letter from the Illinois State Police stating that

defendant's application for a FOID card had been denied. The document was signed and notarized.

The court held that the admission of the certified letter violated defendant's right of confrontation. The document constituted an affidavit that was testimonial hearsay. The affiant was not subject to prior cross-examination and was not shown to be unavailable. And the affidavit was admitted substantively for its truth.

Although defendant testified at trial that he did not have a FOID card, the court held that the error was not harmless. If the affidavit had been properly excluded, the State would not have been able to prove an essential element of the offense and defendant may have decided not to testify. The court reversed the conviction and remanded the case for a new trial.

(Defendant was represented by Assistant Defender Chris Bendik, Chicago.)